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The Relationship between International Law and Domestic Law: Yong Vui Kong v PP [2010] 3 SLR 489 [Case Note]

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Case Note

THE RELATIONSHIP BETWEEN INTERNATIONAL LAW AND DOMESTIC LAW

Yong Vui Kong v PP **[2010] 3 SLR 489**

The Court of Appeal in *Yong Vui Kong v PP* [2010] 3 SLR 489 recently addressed at length the issue of the constitutionality of the mandatory death penalty. In the main, the appellant had argued that the mandatory death penalty was unconstitutional because it violated Art 9(1) of the Constitution of the Republic of Singapore (1999 Rev Ed), which states that: "No person shall be deprived of his life or personal liberty save in accordance with law." The court ultimately rejected this argument. This piece focuses on the main international law issue emanating from the said constitutional challenge, *viz*, the relationship between international law and domestic law.

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I. Establishing the context

1 The appellant in *Yong Vui Kong v PP*[1] ("*Yong Vui Kong*") was 19 years old when he attempted to traffic drugs from Malaysia to Singapore. Subsequent to his arrest, he was convicted under the Misuse of Drugs Act[2] for trafficking in 47.27g of diamorphine,[3] a controlled drug, and was sentenced to death.[4] He challenged his sentence on various grounds, but failed in the end. The resulting judgment by the Court of Appeal was very rich, dealing with various aspects of constitutional law, international law, criminal law and legal theory. This note will deal only with the international law issues that emanate from the constitutional arguments made by the appellant, *viz*, the relationship between international law and domestic law.

1 *Yong Vui Kong v PP* [2010] SLR 489.
2 Cap 185, 2001 Rev Ed.
3 *PP v. Yong Vui Kong* [2009] SGHC 4.
4 *Yong Vui Kong v PP* [2010] 3 SLR 489 at [1].

2 It should be said that this was not the first time that the mandatory death penalty in Singapore had been challenged on constitutional grounds: previous (and similarly unsuccessful) challenges include the Privy Council decision in *Ong Ah Chuan v PP*[5] and the Court of Appeal decision in *Nguyen Tuong Van v PP*.[6] Incidentally, these two cases were considered in detail by the Court of Appeal in *Yong Vui Kong*.[7] And just as in those two cases, the appellant in *Yong Vui Kong* rested his main constitutional argument on Art 9(1) of the Constitution of the Republic of Singapore ("Constitution").[8]

3 Article 9(1) of the Constitution states that:[9] "No person shall be deprived of his life or personal liberty save in accordance with law." The expression "law" is defined in Art 2 of the Constitution as including "written law and any legislation of the United Kingdom or other enactment or instrument whatsoever which is in operation in Singapore and the common law in so far as it is in operation in Singapore and any custom or usage having the force of law in Singapore.". Article 2(1) also states that "written law" refers to "this Constitution and all Acts and Ordinances and subsidiary legislation for the time being in force in Singapore".

4 The appellant's argument on Art 9(1) of the Constitution[10] that is relevant for present purposes was that any mandatory death penalty legislation was not "law" for the purposes of Art 9(1), because "law" included international law – and according to the appellant, customary international law prohibited the mandatory death penalty because it was a form of "inhuman punishment".[11]

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5 *Ong Ah Chuan v PP* [1981] AC 648.

6 *Nguyen Tuong Van v PP* [2005] 1 SLR(R) 103.

7 *Yong Vui Kong v PP* [2010] SLR 489.

8 1999 Rev Ed.

9 Constitution of the Republic of Singapore (1999 Rev Ed).

10 Constitution of the Republic of Singapore (1999 Rev Ed).

11 *Yong Vui Kong v PP* [2010] 3 SLR 489 at [6]. In this connection, the Court of Appeal noted at [7] that: "The Appellant's challenge to the MDP based on Art 9(1) ('the Article 9(1) challenge') is targeted at the mandatory nature of the MDP. It rests on the premise that, because MDP legislation does not give the court any discretion to decide (in view of the circumstances of the case at hand) whether or not to impose the death penalty, such legislation 'treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death' (*per* Stewart J in *Woodson et al v North Carolina* 428 US 280 (1976) ('*Woodson*') at 304). From this perspective, MDP legislation is regarded as being inhuman and, thus, antithetical to the right to life set out in Art 9(1). The Article 9(1) challenge, if successful, will affect the constitutionality of not only the MDP provisions in the MDA, but also all other MDP legislation, such as: (a) s 302 of the Penal Code … *vis-à-vis* the offence of murder; (b) s 4 of the Arms Offences Act … *vis-à-vis* the offence of using or attempting to use arms; (c) s 4A of the Arms Offences Act *vis-à-vis* the offence of using or attempting to use arms to

(*cont'd on the next page*)

II. The decision by the Court of Appeal

5 In relation to the aforementioned argument, the Court of Appeal made the following observations:

> (a) While the appellant asserted that customary international law was part of the expression "law" in Art 9(1) of the Constitution,[12] the appellant cited no authorities for this.[13] In response, the Prosecution accepted that "in principle, the expression 'law' should be interpreted to include [customary international law]".[14] The Court of Appeal, however, resisted this and noted the wider ramifications if it was true that "law" in Art 9(1) included customary international law: "We do not think that the AG, by this reply, was conceding that the expression 'law' in Art 9(1) includes CIL in the sense that 'law' has been defined to include CIL, with the consequence that, once it is shown that there is a rule of CIL prohibiting the MDP as an inhuman punishment, that CIL rule automatically becomes part of 'law' for the purposes of Art 9(1). Indeed, the constitutional definition of 'law' in Art 2(1) is quite different … Besides, such a concession would be contrary to the decision in Nguyen, where this court held at [94], citing (*inter alia*) the Privy Council case of *Chung Chi Cheung v The King* [1939] AC 160 … that in the event of a conflict between a rule of CIL and a domestic statute, the latter would prevail. From his other submissions, it seems clear enough to us that what the AG meant when he said that the expression 'law' should be interpreted to include CIL was that this expression would include a CIL rule which had already been recognised and applied by a domestic court as part of Singapore law".[15]
>
> (b) Domestic law, including the Constitution, should, "as far as possible, be interpreted consistently with Singapore's international legal obligations. There are, however, inherent limits on the extent to which our courts may refer to international human rights for this purpose. For instance, reference to international human rights norms would not be appropriate where the express wording of the Singapore Constitution is not amenable to the incorporation of those

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commit or to attempt to commit an offence listed in the Schedule of the Act; and (d) s 58(1) of the Internal Security Act … *vis-à-vis* the offence of having or carrying, without lawful excuse and without lawful authority, any firearm, ammunition or explosive in a security area …"

12 Constitution of the Republic of Singapore (1999 Rev Ed).

13 *Yong Vui Kong v PP* [2010] SLR 489 at [43].

14 *Yong Vui Kong v PP* [2010] SLR 489 at [44].

15 *Yong Vui Kong v PP* [2010] SLR 489 at [44].

international norms … for our courts to give effect to [such norms], it would be necessary Parliament to first enact new laws (as the drafters of the [Universal Declaration of Human Rights] hoped States would do) or even amend the Singapore Constitution to expressly provide for rights which have not already been incorporated therein".[16]

(c) It was not possible to incorporate a prohibition against inhuman punishment through the interpretation of Art 9(1) of the Constitution because: (i) the Constitution does not contain any express prohibition against inhuman punishment;[17] (ii) the European Convention of Human Rights[18] ("ECHR") (which certain Commonwealth states subsequently modelled their constitutions after) had ceased to apply in British colonies upon their independence;[19] (iii) when the 1957 Malayan Constitution (which heavily influenced the part on fundamental liberties in our Constitution) was drafted, no reference or recommendation was made *vis-à-vis* a prohibition against inhuman punishment even though the Reid Commission knew of the ECHR;[20] (iv) there was again an omission of the prohibition against inhuman punishment from the 1963 Malaysian Constitution (a later version of the 1957 Malayan Constitution, which also heavily influenced the part on fundamental liberties in our Constitution);[21] and (v) a proposal by the Wee Chong Jin Commission in 1966 to add an express constitutional provision (Art 13) prohibiting torture or inhuman punishment was unambiguously rejected by the Government.[22] The proposed Art 13 was the same as Art 3 of the ECHR.[23]

(d) States are "not bound to give effect in their Constitutions to norms and standards elsewhere",[24] and if "the requisite legislative support for a change in the Constitution is forthcoming, a deliberate departure from fundamental human rights may be made, profoundly regrettable although this may be. That is the prerogative of the legislature".[25] There is, "in substance, no difference between *repealing* an existing constitutional provision prohibiting inhuman punishment and

16 *Yong Vui Kong v PP* [2010] SLR 489 at [59].
17 *Yong Vui Kong v PP* [2010] SLR 489 at [61].
18 European Convention on Human Rights (4 November 1950), 213 UNTS 221 ("ECHR".
19 *Yong Vui Kong v PP* [2010] SLR 489 at [61].
20 *Yong Vui Kong v PP* [2010] SLR 489 at [62].
21 *Yong Vui Kong v PP* [2010] SLR 489 at [62].
22 *Yong Vui Kong v PP* [2010] SLR 489 at [64]–[65], [72] and [92].
23 *Yong Vui Kong v PP* [2010] SLR 489 at [66].
24 *Yong Vui Kong v PP* [2010] SLR 489 at [73].
25 Citing *Matthew v State of Trinidad and Tobago* [2005] 1 AC 433 at [73].

deliberately deciding not to enact such a constitutional provision in the first place" [emphasis in original].[26]

(e) Once a customary international norm has been incorporated by the domestic courts into the domestic laws, it becomes part of the common law. The common law, however, is subordinate to statute law. If the expression "law" in Art 9(1) of the Constitution includes customary international law, "the hierarchy of legal rules would be reversed: any rule of [customary international law] that is received via the common law would be cloaked with constitutional status and would nullify any statute or any binding judicial precedent which is inconsistent with it".[27]

(f) A rule of customary international law is not self-executing; "it cannot become part of domestic law until and unless it has been applied as or definitively declared to be part of domestic law by a domestic court. The expression 'law' is defined in Art 2(1) to include the common law only 'in so far as it is in operation in Singapore' … given the existence of the [mandatory death penalty] in several of our statutes, our courts cannot treat the alleged [customary international law] rule prohibiting inhuman punishment as having been incorporated into Singapore law".[28]

(g) If there is a conflict between a rule of customary international law and a domestic statute, the latter prevails.[29]

III. Some comments on the decision

6 As alluded to earlier, it is impossible within the confines of this note to review every aspect of the judgment, so this note will only focus on the international law issues that emanate from the constitutional arguments made by the appellant. While it is submitted that the Court of Appeal's decision in *Yong Vui Kong*[30] in this regard is generally sound and uncontroversial, the decision could have benefitted from a more complete discourse by bringing in and discussing various orthodox strands of thought in contemporary international law.

26 *Yong Vui Kong v PP* [2010] SLR 489 at [74].
27 *Yong Vui Kong v PP* [2010] SLR 489 at [87]–[90].
28 *Yong Vui Kong v PP* [2010] SLR 489 at [91].
29 *Yong Vui Kong v PP* [2010] SLR 489 at [91].
30 *Yong Vui Kong v PP* [2010] SLR 489.

A. Whether "law" includes customary international law – monist and dualist approaches

7 A local commentator once pointed out: "While [the Constitution] is silent in key respects on the interaction between international law and the Singapore domestic legal system, the executive, legislative and judicial branches in Singapore have all demonstrated a keen appreciation of what international law requires and allows."[31] Indeed, in the aftermath of *Nguyen Tuong Van v PP*,[32] it was commented that if the expression "law" in Art 9(1) of the Constitution[33] included rules of customary international law, this would make "the Singapore Constitution a closer cousin of the American and German Constitutions than that of the United Kingdom. That this would fly in the face of our normal practice and understanding of the relationship between international law and Singapore law is without doubt".[34] It was further commented that:[35]

> Furthermore, if by 'international law' (in this argument) we also mean to include treaty laws, an unbearable tension would be created with Article 38 [of the Constitution], which vests the legislative power of Singapore in the 'Legislature which shall consist of the President and Parliament'. The retort here may simply be that this in fact creates no greater tension than that of which necessarily exists between, say, Article 38 and Article 93 (the judicial power of Singapore), and which has never been viewed to be especially problematic in practice. [footnote omitted]

8 That the Constitution[36] includes reference to international law has been referred to as the "monist approach" (or monism) – that is, international law and domestic/municipal law are but parts of a single system, and the mere act of ratification immediately incorporates the international legal obligation into domestic law.[37] Insofar as this is concerned, local commentators seem to agree that given what is written (and what is not written) in the Constitution, the "dualist approach" (or

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31 Lim Chin Leng, "Singapore and International Law, <http://www.singaporelaw.sg/content/IntLaw.html> (accessed 3 January 2011).

32 [2005] 1 SLR(R) 103.

33 Constitution of the Republic of Singapore (1999 Rev Ed).

34 Lim Chin Leng, "The Constitution and the Reception of Customary International Law: *Nguyen Tuong Van v Public Prosecutor*" [2005] SJLS 218 at 226.

35 Lim Chin Leng, "The Constitution and the Reception of Customary International Law: *Nguyen Tuong Van v Public Prosecutor*" [2005] SJLS 218 at 226. See also Peter Malanczuk, *Akehurt's Modern Introduction to International Law* (US: Routledge, 7th Ed,1997) at pp 63–74.

36 Constitution of the Republic of Singapore (1999 Rev Ed).

37 See, *eg*, Lim Chin Leng, "The Constitution and the Reception of Customary International Law: *Nguyen Tuong Van v Public Prosecutor*" [2005] SJLS 218 at 227.

dualism) appears to be the one that is more relevant in Singapore,[38] that is, there is no "automatic" reception or incorporation of international law[39] – and in the case of international treaty law, Art 38 of the Constitution vests the lawmaking power in the Legislature, and not the Executive.[40] So the issue is really the reception of customary international law. To this end, it has been argued that the concept of the maintenance of the separation of powers is highly relevant to the discussion:[41]

> No-one argues against the view that the power to conduct foreign affairs is vested in the Executive. Could the Constitution be taken to imply this? If so, then it may be thought that such power includes the power to determine Singapore's attitude towards particular rules of customary international law. Judges then may, at best, only go so far as to discover customary international law as part of the common-law in Singapore. The courts should not decide Singapore's position under customary international law without reference to the Executive … say that the Constitution imports a particular customary rule, and strike down Parliamentary legislation for contradicting that rule (and therefore the Constitution) …
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> The courts may scrutinise legislation for conformity with the Constitution where the meaning given to constitutional provisions may be derived by a variety of means of legal reasoning, but not where such scrutiny is had *purely* by reference to what the courts alone consider to be an existing international legal standard. The courts must be wary of a hidden usurpation of the legitimate exercise (or non-exercise) of the foreign affairs powers of the Republic of Singapore [footnote omitted], which surely includes the foreign affairs power to define and determine Singapore's attitude towards regulation by a particular international customary rule. The courts cannot go there because this power belongs to the Executive [footnote omitted]. Put simply, the application of such international standards may affect the proper separation of the executive power in foreign affairs and the judicial power in Singapore.

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38 See, *eg*, Lim Chin Leng, "The Constitution and the Reception of Customary International Law: *Nguyen Tuong Van v Public Prosecutor*" [2005] SJLS 218 at 228–229; Thio Li-ann, "The Death Penalty as Cruel and Inhuman Punishment Before the Singapore High Court? Customary Human Rights Norms, Constitutional Formalism and the Supremacy of Domestic Law in *PP v Nguyen Tuong Van* (2004)" 4 OUCLJ 1 at 10–11; and Simon Tay, "The Singapore Legal System and International Law: Influence or Interference?" in *The Singapore Legal System* (Kevin Tan ed) (Singapore: Singapore University Press, 2nd Ed, 1998) p 467 at p 472. The monist and dualist regimes are the two most predominant regimes in international law today.

39 See also *Yong Vui Kong v PP* [2010] 3 SLR 489 at [91].

40 See also Lim Chin Leng, "Singapore and International Law, <http://www.singaporelaw.sg/content/IntLaw.html> (accessed 3 January 2011).

41 Lim Chin Leng, "The Constitution and the Reception of Customary International Law: *Nguyen Tuong Van v Public Prosecutor*" [2005] SJLS 218 at 229–231.

> It might be objected, firstly, that it is for the courts to declare the meaning of the Constitution. If so … it is not for the Executive to say what customary international law (as part of the Singapore Constitution) looks like. However … the courts, in choosing to interpret the Constitution one way or another, would nonetheless not do so arbitrarily. Judicial decisions must, after all, rest on legal reasoning and legal principle. What is the true legal principle to be applied in such cases then? Simply put, the courts and the Executive should speak with "one voice" [footnote omitted] …
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> It might still be objected that the present line of argument makes a mockery of the fundamental liberties … After all, it seems to make little sense to say that the Constitution is supreme [footnote omitted], while saying at the same time the courts should defer to the Executive where the Constitution requires (*ex hypothesi*) the application of international law in ensuring respect for the fundamental liberties … The simple answer here is that the fundamental liberties may still be given breadth and meaning by other means … that would achieve the same result.
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> [emphasis in original]

9 It is submitted that the views espoused in the preceding paragraphs on the monist–dualist distinction and the separation of powers are correct, and could have been used to elucidate and fortify the reasoning of the Court of Appeal in *Yong Vui Kong*,[42] which did not go into any express discussion of monism and dualism (although it highlighted the concept of separation of powers).[43] This is especially so since the court's judgment could potentially have given the impression that *all* rules of customary international law are not self-executing in *any* legal system,[44] and that if such rules were indeed self-executing, they would subvert the vertical hierarchy of the domestic (common law) legal system.[45] It should also be noted that there may actually be at least one exception to the dualist approach, and that is when an international norm falls under the very narrow realm of *jus cogens*.[46] But as things stand, common examples (such as slavery and genocide) cited for *jus cogens* are few and far between, and there is no reason or evidence at this point in time (or anytime soon) to believe that the

42 *Yong Vui Kong v PP* [2010] SLR 489.

43 How international law and domestic law interact remains a live international law issue throughout the world with much room for further discourse, as highlighted by President of the International Court of Justice Owada during the 2010 Singapore Academy of Law Annual Lecture: Singapore Academy of Law Annual Lecture <http://www.sal.org.sg/Lists/Latest%20SAL%20Happenings/DispForm.aspx?ID=30> (forthcoming).

44 *Yong Vui Kong v PP* [2010] SLR 489 at [91].

45 *Yong Vui Kong v PP* [2010] SLR 489 at [87]–[90].

46 Lim Chin Leng, "The Constitution and the Reception of Customary International Law: *Nguyen Tuong Van v Public Prosecutor*" [2005] SJLS 218 at 231.

mandatory death penalty should be brought into that narrow class of examples.[47]

B. Actual requirements and expectations of international law

10 The actual requirements and expectations of the international law regime should also have been considered and expressly discussed. For one, it may be said that international law is not concerned with how customary international norms are *implemented* by the various states. This may partly explain why the dualist approach is purportedly still the approach taken by the majority of Commonwealth jurisdictions[48] – although there are supposedly signs that this is gradually changing.[49] For another, while international law is binding on states, and states are obligated to give effect to their international legal obligations, international law does not *replace* or *supersede* the domestic law of states.[50] Moreover, while international law depends on the governments of states and their constitutional and legal systems for the adherence to and enforcement of international law, the obligation to respect and give effect to international law is *upon the State*, and not upon any particular *branch* or body of the Government.[51] It is the State, as a whole, which is responsible to ensure its constitution and its laws enable its government to duly perform its international legal obligations.[52] Having

47 *See* Damrosch, Henkin, Murphy & Smidt, *International Law* (US: West, 5th Ed, 2009) at pp 55–112.

48 Lim Chin Leng, "Singapore and International Law, <http://www.singaporelaw.sg/content/IntLaw.html> (accessed 3 January 2011).

49 See, *eg*, Michael Kirby, "The Growing Rapprochement Between International Law and National Law" < http://www.highcourt.gov.au/speeches/kirbyj/kirbyj_weeram.htm > (accessed 25 January 2011). Whether the shift is towards monism, however, remains unclear. See also The Bangalore Principles <http://www.genderandtrade.org/shared_asp_files/uploadedfiles/%7BA2407AAC-A477-491D-ABA4-A2CADF227E2B%7D_BANGALORE%20PRINCIPLES.pdf> (accessed 3 January 2011).

50 Damrosch, Henkin, Murphy & Smidt, *International Law* (US: West, 5th Ed, 2009) at p 652.

51 Damrosch, Henkin, Murphy & Smidt, *International Law* (US: West, 5th Ed, 2009) at p 652.

52 Damrosch, Henkin, Murphy & Smidt, *International Law* (US: West, 5th Ed, 2009) at p 652 at pp 652–654. See also *Medellin v Texas* (2008) 128 S Ct 1346 at 1356: "[W]hile treaties 'may comprise international commitments ... they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that if be "self-executing" and is ratified on these terms' ... A treaty is, of course, 'primarily a compact between independent nations' ... It ordinarily 'depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it' ... 'If these [interests] fail, its infraction becomes the subject of international negotiations and reclamations ... It is obvious that with all this the judicial courts have nothing to do and can give no

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said that, all of the above – effectively encapsulated by the term the "black-box theory of international law" – has been called into question in recent times.[53] The main force agitating this change appears to be a recent growing global demand for an increase in the effectiveness of international law.[54] Nevertheless, there is no compelling indication at this point in time that the "black-box" theory is about to be significantly discredited anytime soon, and therefore, the prevailing orthodoxy is that the responsibility to adhere to international legal obligations falls on the State, and not on any of its organs.

11 At any rate, it is submitted that the Court of Appeal in *Yong Vui Kong*[55] could have pointed out that both the monist and dualist regimes are equally capable of ensuring that a state's international law obligations are complied with – because on one view, the most one can say is that a monist regime is *possibly* less at risk of violating international legal obligations because its judiciary can, in principle, apply international law directly.[56] On another view, however, it has been said that "[while in the monist] jurisdictions international law will be treated as a familiar topic, one that both the judge and the counsel before will expect to deal with on a routine basis … there is another culture that exists [usually in the dualist jurisdictions], in which it is possible to become a practising lawyer without having studied international law, and indeed to become a judge without knowing international law. Psychologically that predisposes both counsel and judge to treat international law as some exotic branch of the law, to be avoided if at all possible, and to be looked upon as if it is unreal, of no practical application in the real world".[57] The response to the latter view

redress.' ... the UN Charter does not contemplate the automatic enforceability of ICJ decisions in domestic courts."

53 See, *eg*, Ward Ferdinandusse, "Out of the Black-Box? The International Obligation of State Organs" (2003) 29 Brook J Int'l L 45.

54 Ward Ferdinandusse, "Out of the Black-Box? The International Obligation of State Organs" (2003) 29 Brook J Int'l L 45 at 47.

55 *Yong Vui Kong v PP* [2010] SLR 489.

56 Antonio Cassese, *International Law in a Divided World* (UK: Clarendon Press, 1994) at pp 14–16; Elihu Lauterpacht, *International Law Volume 1* (UK: Cambridge University Press, 2004) at p 153.

57 Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (UK: Oxford University Press, 1994) at p 206 [*Problems and Process*]. Higgins went on to add at p 218: "The opportunity for [states] to examine international law matters is significantly reduced in dualist systems whereby interpretation and application of treaties is broadly permissible only when the treaty has been directly incorporated." See also Harold Koh, "Transnational Public Law Litigation" (1991) 100 Yale LJ 2347 at 2349: "A strictly dualist view denies a meaningful role to both individuals and domestic courts in the making of international law. In a dualistic system, individuals injured by foreign states would have no right to pursue claims directly against those states in either domestic or international fora. Instead, their states would pursue those claims for them on a discretionary basis in international for a …"

is that cases like *Nguyen Tuong Van v PP*[58] and *Yong Vui Kong* will perhaps show that insofar as Singapore is concerned, our courts are not totally averse to (or incapable of) discourses on international law in their judgments, nor have they (recently at least) treated international law contemptuously as an alien subject matter.[59]

C. Utility and relevance of the Bangalore Principles

12 What if we conceive of international law as having a different role instead? For instance, the Bangalore Principles (which were not mentioned in *Yong Vui Kong*), as originally conceived, state that: "In most countries whose legal systems are based upon common law, international conventions are not directly enforceable in domestic courts unless their provisions have been incorporated by legislation into domestic law. However, there is a growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law – whether constitutional, statute, or common law – is uncertain or incomplete."[60] While this seems like a palatable hybrid solution, there are some problems.

13 First, the conception that international law has some sort of interpretive role to play comes to the fore most strongly within the international human rights context.[61] If anything, there have been indications (from the Government, at least) that Singapore does not necessarily subscribe to a universalised understanding of all human rights.[62] The Court of Appeal in *Yong Vui Kong* also alluded to the fact

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58 [2005] 1 SLR(R) 103 at [84]–[92].

59 *Cf* Thio Li-ann, "Pragmatism and Realism do not Mean Abdication: A Critical and Empirical Inquiry into Singapore's Engagement with International Human Rights Law" (2004) SYBIL 41 at 58–59.

60 The Bangalore Principles <http://www.genderandtrade.org/shared_asp_files/uploadedfiles/%7BA2407AAC-A477-491D-ABA4-A2CADF227E2B%7D_BANGALORE%20PRINCIPLES.pdf> (accessed 3 January 2011).

61 The Bangalore Principles <http://www.genderandtrade.org/shared_asp_files/uploadedfiles/%7BA2407AAC-A477-491D-ABA4-A2CADF227E2B%7D_BANGALORE%20PRINCIPLES.pdf> (accessed 3 January 2011).

62 See, *eg*, Thio Li-ann, "Pragmatism and Realism do not Mean Abdication: A Critical and Empirical Inquiry into Singapore's Engagement with International Human Rights Law" (2004) SYBIL 41 at 43–59; Wong Kan Seng, "The Real World of Human Rights" [1993] SJLS 605. Though he may not have spoken on behalf of the nation, Professor Walter Woon did once say, while he was Attorney-General, that foreigners who harbour the "delusion that they define human rights for the rest of humanity" should be called "fanatics": see Lydia Lim, "Human rights' label often abused" *The Straits Times* (4 July 2008) available online:

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that judicial reference to international human rights will be, in many instances, quite heavily circumscribed, particularly if the Constitution[63] does not expressly provide for such rights.[64] Second, uncertainty, inconsistency and incompleteness exist not only in degrees, but also in types. For the same domestic norm and international norm being compared, some may, for instance, consider the difference (conceptual or otherwise) to be so fundamental that there is no valid basis for comparison. Others may consider the difference to be a mere matter of slight inconsistency, or any asymmetry between an international norm and a domestic norm to be an absolute barrier to the introduction of the international norm, or that either norm is framed too vaguely or too broadly such that it only has aspiratory value and is not necessarily binding. The Court of Appeal in *Yong Vui Kong*, for instance, has already said that "reference to international human rights norms would not be appropriate where the express wording of the Singapore Constitution is not amenable to the incorporation of those international norms".[65] The term "amenable" is conceivably very broad (and maybe vague), and ultimately situates the Singapore position firmly in the dualist school, rendering the applicability and utility of the Bangalore Principles uncertain. Third, the Bangalore Principles have existed for a substantial period of time, but they remain relatively untested norms, and until they are affirmed or their nuances brought out more clearly on a truly notable platform, their relevance and pedigree arguably remain suspect.

D. Where there is a conflict between international law and domestic law

14 This is a related but separate issue from whether international law is automatically received in Singapore. Both *Nguyen Tuong Van v PP*[66] and *Yong Vui Kong* said, unequivocally, that statute would prevail if there is a conflict between statute and customary international law.[67] In other words, "an international rule received into Singapore law by way of the common law remains subject to the contrary demands of statute and the Constitution in Singapore".[68] A qualifier can be added to this, in that "only if certain rules of customary international law are not imported into the words of the constitution … In such a case, the

<http://app.mfa.gov.sg/pr/read_content.asp?View,10534,> (accessed 3 January 2011).

63 Constitution of the Republic of Singapore (1999 Rev Ed).

64 *Yong Vui Kong v PP* [2010] 3 SLR 489 at [59].

65 *Yong Vui Kong v PP* [2010] 3 SLR 489 at [59].

66 [2005] 1 SLR(R) 103.

67 *Yong Vui Kong v PP* [2010] 3 SLR 489 at [91].

68 Lim Chin Leng, "Singapore and International Law, <http://www.singaporelaw.sg/content/IntLaw.html> (accessed 3 January 2011).

constitutional provision would prevail over an inconsistent statutory provision".[69]

15 Because this principle (domestic statutory law prevailing when there is a conflict) appears consistent with a dualist regime, it would again have been more helpful if the court had alluded to or discussed the monist-dualist distinction, as well as the accompanying implications. It seems apparent that a monist regime and a dualist regime would likely have different answers to the question as to what happens when international law and domestic law conflict – that is just the practical reality of the matter. As Rosalyn Higgins once put it:[70]

> Whichever view you take [monism or dualism], there is still the problem of which system prevails when there is a clash between the two. One can give answers to that question at the level of legal philosophy; but in the real world the answer often depends upon the tribunal answering it … and upon the question asked. The International Court of Justice has indicated [*eg*, in the *Nottebohm Case*][71] that for it domestic law is a fact. On some matters even an international court will need to apply this law … But when the issue is whether an international obligation can be avoided, or excused, because of a deficiency or contradiction in domestic law, then for an international tribunal the answer is clear – it cannot, and the obligation in international law remains. The domestic court may be faced with a difficult question, when the domestic law which is its day-to-day task to apply entails a violation of an international obligation. Domestic courts *do* address that problem differently. Leaving the theoretical aspects aside for a moment, it is as a practical matter difficult to persuade a national court to apply international law, rather than the domestic, if there appears to be a clash between the two. But it is more possible in some courts than in others … the difference in response to a clash of international law and domestic law in various domestic courts is substantially conditioned by whether the country is monist or dualist in its approach. [emphasis in original]

16 Indeed, under the monist theory in which "law" is seen as one entity comprising national and international law, where there is conflict between international law and domestic law, international law is supposed to be, on one view at least, supreme. An example of a proponent of such a view is perhaps the renowned positivist and international law scholar Hans Kelsen, who considers the supremacy of international law as simply a logical consequence of his concept of the

69 Lim Chin Leng, "The Constitution and the Reception of Customary International Law: *Nguyen Tuong Van v Public Prosecutor*" [2005] SJLS 218 at 227.

70 Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (UK: Oxford University Press, 1994) at pp 205–206.

71 *Nottebohm Case (Liechtenstein v Guatemala*), 1955 WL 1 (ICJ 1955).

grundnorm,[72] in that international law represents a higher legal order because it is derived from state practice and domestic law is but derived from the states as established in international law.[73] Then there are the likes of Hersch Lauterpacht and other proponents of universal human rights, who consider the supremacy of international law as necessary because it (theoretically) provides the best guarantee for the protection of human rights and liberties for individuals – and this, of course, is built on the idea that the State is a collection of individuals rather than an abstract and single entity.[74] Thirdly, there is the natural law conception – the supposed genesis of international law and indeed international human rights[75] – which proposes a vertical hierarchy of natural law, international law and domestic law. Under this conception – and paradoxically coming to the same conclusion as the positivist Kelsen – international law will naturally prevail if it conflicts with domestic law.[76] The departure from Kelsen and positivism, presumably, is that natural law will not trump international law because natural law, if it even exists, is not "law" in the sense of being part of any legal system.

17 But while the principle of domestic law prevailing over international law is compatible with a dualist regime, it remains a trite

72 For Kelsen, "an act or an event gains its legal-normative meaning by another legal norm that confers this normative meaning on it. An act can create or modify the law if it is created in accordance with another, 'higher' legal norm that authorizes its creation in that way. And the 'higher' legal norm, in turn, is legally valid if and only if it has been created in accord with yet another, 'higher' norm that authorizes its enactment in that way": see Andrei Marmor, "The Pure Theory of Law" <http://plato.stanford.edu/entries/lawphil-theory/> (accessed 3 Janaury 2011).

73 For Kelsen, "an act or an event gains its legal-normative meaning by another legal norm that confers this normative meaning on it. An act can create or modify the law if it is created in accordance with another, 'higher' legal norm that authorizes its creation in that way. And the 'higher' legal norm, in turn, is legally valid if and only if it has been created in accord with yet another, 'higher' norm that authorizes its enactment in that way": see Andrei Marmor, "The Pure Theory of Law" <http://plato.stanford.edu/entries/lawphil-theory/> (accessed 3 Janaury 2011). This view is not without its problems: for example, if Kelsen is correct, there can effectively only be one basic (public international law) norm in the whole world.

74 Antonio Cassese, *International Law in a Divided World* (UK: Clarendon Press, 1994)at p 17; A F M Maniruzzaman, "State Contracts in Contemporary International Law: Monist versus Dualist Controversies" (2001) EJIL 309 at 312–313.

75 Damrosch, Henkin, Murphy & Smidt, *International Law* (US: West, 5th Ed, 2009) at pp xix–xxx; Brian Opeskin, "Constitutional Modelling: The Domestic Effect of International Law in Commonwealth Countries: Part 1" (2000) Public Law 2000, 607 at 615.

76 Brian Opeskin, "Constitutional Modelling: The Domestic Effect of International Law in Commonwealth Countries: Part 1" (2000) Public Law 2000, 607 at 615; Emeka Duruigbo, "Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges" (2008) 6 Nw U J Int'l Hum Rts 222 at para 27.

principle in public international law that a state cannot plead its own domestic law as a reason or excuse for non-compliance with its international legal obligations.[77] Again, it seems that as a first step to reconcile the relationships, we are forced into the unintuitive distinction mentioned above between international obligations on a state as a whole, and international obligations on a particular branch or organ of a state.[78] And building on the monism-dualism distinction discussed earlier, it will be remiss not to put another (possibly radical) possibility on the table that will shed more light on this situation of conflicting international and domestic norms. Mann and Fitzmaurice have proposed, separately – perhaps as an extreme application of dualism – that international law and domestic law simply do not operate in the same realm, and because of that, conflict between them is a moot point.[79] Supremacy thus refers only to the apex of the respective fields; the corollary of which is that any apparent conflict in the domestic field is automatically settled by the domestic conflict rules of the forum and any conflict in the international field would be resolved by international law.[80] Taking a leaf from the field of conflict of laws (or private international law), they further posit that it is useless to discuss the supremacy of international law in the international law field as supreme simply because of the fact that it is the only law that there is. It is supremacy not arising from the content but from the field of operation.[81] President Hisashi Owada of the International Court of Justice, however, recently opined that he remains convinced that monism and dualism are the only legitimate and realistic schools of thought in this matter.[82]

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77 Damrosch, Henkin, Murphy & Smidt, *International Law* (US: West, 5th Ed, 2009) at p 652.

78 Damrosch, Henkin, Murphy & Smidt, *International Law* (US: West, 5th Ed, 2009) at p 652 at pp 652–654. See also *Medellin v Texas* (2008) 128 S Ct 1346 at 1356: "[W]hile treaties 'may comprise international commitments ... they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that if be "self-executing" and is ratified on these terms' ... A treaty is, of course, 'primarily a compact between independent nations' ... It ordinarily 'depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it' ... 'If these [interests] fail, its infraction becomes the subject of international negotiations and reclamations ... It is obvious that with all this the judicial courts have nothing to do and can give no redress.' ... the UN Charter does not contemplate the automatic enforceability of ICJ decisions in domestic courts.".

79 A F M Maniruzzaman, "State Contracts in Contemporary International Law: Monist versus Dualist Controversies", (2001) EJIL 309 at 320–322.

80 A F M Maniruzzaman, "State Contracts in Contemporary International Law: Monist versus Dualist Controversies", (2001) EJIL 309 at 320–322.

81 A F M Maniruzzaman, "State Contracts in Contemporary International Law: Monist versus Dualist Controversies", (2001) EJIL 309 at 320–322.

82 President of the International Court of Justice Owada, Singapore Academy of Law Annual Lecture 2010

(*cont'd on the next page*)

E. An argument from analogy of the rules of natural justice?

18 Finally, as a point distinct from the prior discussions on international law *per se*, since the question here of what "law" in Art 9(1) of the Constitution[83] entails (*viz*, whether it includes international law) is essentially a definitional issue, it may be helpful to consider how "law" has been defined in other (non-international law) contexts. In *Ong Ah Chuan v PP*, in relation to whether "law" could simply encompass any statute passed by Parliament, however arbitrary or contrary to fundamental rules of natural justice the provisions of such a statute might be, the Privy Council stated that references to "law" in the Constitution incorporated "fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution".[84] The Court of Appeal in *Yong Vui Kong*, however, observed that the Privy Council was unclear as to what sort of legislation would actually not qualify as "law" for the purposes of Art 9(1).[85] The Court of Appeal therefore postulated that: "Perhaps, the Privy Council had in mind colourable legislation which purported to enact a 'law' as generally understood (*ie*, a legislative rule of general application), but which in effect was a legislative judgment, that is to say, legislation directed at securing the conviction of particular known individuals … or legislation of so absurd or arbitrary a nature that it could not possibly have been contemplated by our constitutional framers as being 'law' when they crafted the constitutional provisions protecting fundamental liberties".[86]

19 On the one hand, the continued (local) judicial affirmation of *Ong Ah Chuan v PP*[87] may be seen as a door left half-open to further expand the definition of "law" in Arts 2 and 9(1) of the Constitution,[88] for instance to include other unwritten aspects such as customary international law. On the other hand and on a close reading of *Yong Vui Kong*, however, the Court of Appeal was only prepared to maintain the extended definition of *statutory law*, and not *law in general*. Its interpretation of *Ong Ah Chuan v PP* also seems to suggest a narrow extension of the definition of statutory law, rather than a broad extension, *viz*, a specific category of laws that do not conform to the

<http://www.sal.org.sg/Lists/Latest%20SAL%20Happenings/DispForm.aspx?ID=30> (forthcoming).

83 Constitution of the Republic of Singapore (1999 Rev Ed).

84 *Ong Ah Chuan v PP* [1981] AC 648 at 670.

85 *Yong Vui Kong v PP* [2010] 3 SLR 489 at [16].

86 *Yong Vui Kong v PP* [2010] 3 SLR 489 at [16].

87 [1981] AC 648. See, *eg*, *Yong Vui Kong v PP* [2010] 3 SLR 489 at [18]–[21]; *Nguyen Tuong Van v PP* [2005] 1 SLR(R) 103 at [82].

88 Constitution of the Republic of Singapore (1999 Rev Ed).

rules of natural justice.[89] In view of this, and in line with the Judiciary's traditional preference to be more positivistic and history-inquiring (in its constitutional interpretations),[90] and non-interfering in the provinces of the Legislature, it seems that the application of *Ong Ah Chuan v PP* is fairly specific and limited in understanding if "law" in Arts 2 and 9(1) of the Constitution can include international law.

IV. Conclusion

20 *Yong Vui Kong* may well be the final word in a long time on the judicial application of international law.[91] Accordingly, its analysis *vis-à-vis* international law would have been made even more robust with clearer discussions on contemporary and orthodox strands of thought in international law, such as the monism-dualism distinction, the consequences of such a distinction, the actual requirements and expectations of performing international legal obligations, and even the relevance of the Bangalore Principles. If anything, this might have achieved some mileage in dispelling any perceptions that dualist jurisdictions are reluctant to consider international law more thoroughly in their judicial decisions.

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89 *Cf* its insistence that *Jabar bin Kandermastan v PP* [1995] 1 SLR(R) 326 ("*Jabar*") was consistent with *Ong Ah Chuan v PP* [1981] AC 648 and *Nguyen Tuong Van v PP* [2005] 1 SLR(R) 103, despite the court saying in *Jabar* (at [52]) that "[a]ny law which provides for the deprivation of a person's life or personal liberty … is valid and binding so long as it is validly passed by Parliament": *Yong Vui Kong v PP* [2010] 3 SLR 489 at [19].

90 See, *eg*, the preceding section in this note.

91 See also *Yong Vui Kong v PP* [2010] 3 SLR 489 at [123].